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IN THE

# SUPREME COURT OF THE UNITED STATES OF AMERICA

**OCTOBER TERM, 1986**

SHEARSON LEHMAN BROTHERS, INC., JOSEPH F. BODKIN, AND NICHOLAS BUSTAMANTE,
*Petitioners*

*v.*

MAYAJA, INC., ORART, S.A. TEXAS, INC., ELIAS SHEINBERG, AND MARCIA SHEINBERG,
*Respondents*

## RESPONDENTS' BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## Question Presented

Whether claims brought under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) are subject to arbitration.

## List of Parties

The parties to the proceeding in the Court of Appeals were the Respondents:

1. Mayaja, Inc., a Cayman Islands Corporation;
2. Orart, S.A., Texas, Inc., a Texas corporation;
3. Elias Sheinberg, a resident of Mexico City, Mexico; and
4. Marcia Sheinberg, the wife of Elias Sheinberg and also a resident of Mexico City, Mexico.

The officers, directors and shareholders of Mayaja and Orart are all members of the family of Salomon Smilovici, a resident of Mexico City, Mexico. Marcia Sheinberg is the stepdaughter of Salomon Smilovici.

Also before the Court of Appeals were the Petitioners:

1. Shearson Lehman Brothers, Inc.;
2. Nicholas Bustamante; and
3. Joseph F. Bodkin.

Petitioner Shearson Lehman Brothers, Inc., in its petition for certiorari, has stated that it is a wholly owned subsidiary of Shearson Lehman Brothers Holdings Inc. and that Shearson Lehman Brothers Holdings Inc. is a wholly owned subsidiary of American Express Company. Further, Shearson Lehman Brothers, Inc. has stated that the following are non-wholly owned subsidiaries and affiliates:

Active Subsidiaries:

(a) Boston Hambro Corp.
(b) Boulevard Investors Inc.
(c) Boulevard Real Estate Corp.
(d) Burlington Investors Inc.
(e) E. B. Realty
(f) Lombard Realty Corporation
(g) Lowell Investors Inc.
(h) Lowell Real Estate Corp.
(i) Shearson Dat-Cheong Company Limited
(j) Shearson Lehman/Amex Finanz A.G.
(k) Shearson/KM, Inc.
(l) Shearson/NGP Inc.

Inactive Subsidiaries:

(a) Genex Insurance Brokerage Ltd.
(b) Mideast-American, Inc.

Affiliates:

(a) Banque Eurofin
(b) Barony Company Ltd.
(c) California S.A.
(d) Carnegie Capital Management Company
(e) Shearson Financial Services of Oklahoma, Inc.
(f) Shearson Financial Services of Texas, Inc.
(g) Shearson Lehman Brothers SARL
(h) Intermodal Equipment Associates
(i) KCC Syndicate Managers, Inc.
(j) McLeod Young Weir Limited
(k) New World Corporation
(l) Rex Moor Properties Incorporated
(m) Russell Energy Inc.
(n) Sovran Energy Corp.

Shearson Lehman Brothers, Inc. has also stated that the non-wholly owned subsidiaries of Shearson Lehman Brothers Holdings Inc. are as follows: –

(a) American Express Asset Management Limited
(b) American Express Asset Management N.V.
(c) American Express Asset Management S.A.
(d) American Express U.K. Holding Company Inc.
(e) Dr. Pepper Holding Company
(f) FGIC Corporation
(g) Kuhn Loeb Lehman Brothers International B.V.
(h) Lehman Brothers International UK Ltd.
(i) Lehman International Finance N.V.
(j) Lehman Overseas N.V.
(k) LBKL 82-1 Investors Inc.
(l) Shearson Lehman Broadgate North Inc.
(m) Shearson Lehman Broadgate South Inc.
(n) Shearson Lehman Brothers Limited
(o) The McLeod Young Weir Corporation.

## Table of Contents


| | Page |
|---|---|
| Question Presented | i |
| List of Parties | ii |
| Table of Contents | v |
| Table of Authorities | vi |
| Opinion Below | 1 |
| Jurisdiction | 2 |
| Statutes Involved | 2 |
| Statement of the Case | 4 |
| Summary of the Argument | 6 |
| Reason for Granting the Writ | 6 |
| In *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. ____, 84 L.Ed.2d 158, 162 (1985), this Court noted that the arbitrability of claims arising under § 10(b) of the Securities Exchange Act of 1934, or under Rule 10b-5, had not been resolved. This is an important issue of federal law with respect to which there is a conflict among the Circuits. Although Respondents believe the issue was correctly decided by the Fifth Circuit, Respondents support the granting of a writ of certiorari. | 6 |
| Conclusion | 11 |
| Certificate of Service | 13 |
| Appendices | |
| A. Opinion of the United States Court of Appeals for the Fifth Circuit | A-1 |
| B. Orders entered by the United States District Court for the Western District of Texas, San Antonio Division denying Defendants motions to stay and compel arbitration | B-1 |

## Table of Authorities


| Case Authorities | Page |
|---|---|
| *AFP Imaging Corp. v. Ross*, 780 F.2d 202 (2d Cir. 1985) | 8 |
| Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 538 F.2d 532 (3d Cir. 1976), cert. denied, 429 U.S. 1010 (1976) | 8 |
| Bodart v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 797 F.2d 775 (9th Cir. 1986) | 8 |
| Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir. 1966) | 11 |
| Conover v. Dean Witter Reynolds, Inc., 794 F.2d 520 (9th Cir. 1986) | 8, 11 |
| Cort v. Ash, 422 U.S. 62 (1975) | 9 |
| Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985) | v, 6, 8 |
| De Lancie v. Birr, Wilson & Co., 648 F.2d 1255 (9th Cir. 1981) | 8 |
| Herman & Maclean v. Huddleston, 459 U.S. 375 (1983) | 10 |
| Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 797 F.2d 1197 (3d Cir. 1986) | 8 |
| J. I. Case Co. v. Borak, 377 U.S. 426 (1964) | 9 |
| Mayaja, Inc. v. Bodkin, 803 F.2d 157 (5th Cir. 1986) | 1 |
| McMahon v. Shearson/American Express, Inc., 788 F.2d 94 (2d Cir. 1986), cert. granted, 55 U.S.L.W. 3197 (U.S. Oct. 6, 1986) (No. 86-44) | 8 |


*(Continued on following page)*

## Table of Authorities (Continued)

**Case Authorities (Continued)** **Page**

*Merrill Lynch, Pierce, Fenner & Smith v. Curran*,
456 U.S. 353 (1982) ..... 10

*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore*,
590 F.2d 823 (10th Cir. 1978) ..... 8

*Moran v. Paine, Webber, Jackson & Curtis*,
389 F.2d 242 (3d Cir. 1968) ..... 11

*Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*,
806 F.2d 291 (1st Cir. 1986) ..... 8

*Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,
795 F.2d 1393 (8th Cir. 1986) ..... 8

*Piper v. Chris Craft Industries, Inc.*,
430 U.S. 35 (1977) ..... 9

*Superintendent of Insurance v. Bankers Life & Casualty Co.*,
404 U.S. 6 (1971) ..... 9, 10

*Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,
558 F.2d 831 (7th Cir. 1977) ..... 8

*Wilko v. Swan*,
346 U.S. 427 (1953) ..... 8, 10, 11

*Wolfe v. E. F. Hutton & Co., Inc.*,
800 F.2d 1032 (11th Cir. 1986) (*en banc*) ..... 8

*(Continued on following page)*

**Page**

**Federal Statutes**

Racketeer Influenced and Corrupt Organizations Act,
18 U.S.C. §§ 1961-1968 ..... 4, 6

18 U.S.C. § 1964(c) ..... 4

Securities Act of 1933,
15 U.S.C. §§ 77a-77aa ..... 8, 9, 11

15 U.S.C. § 77k ..... 9
15 U.S.C. § 77*l* ..... 8, 9
15 U.S.C. § 77n ..... 8
15 U.S.C. § 77v ..... 9

Securities Acts Amendments of 1975,
Pub. L. 94-24, 89 Stat. 97 ..... 10

Securities Exchange Act of 1934,
15 U.S.C. §§ 78a-78kk ..... 4, 6, 8, 9, 11

15 U.S.C. § 78b ..... 9
15 U.S.C. § 78i ..... 9
15 U.S.C. § 78j(b) ..... i, v, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12
15 U.S.C. § 78p ..... 9
15 U.S.C. § 78r ..... 9
15 U.S.C. §§ 78aa ..... 2, 9
15 U.S.C. § 78cc ..... 3, 8, 9, 10

United States Arbitration Act,
9 U.S.C. § 1-14 ..... 7

9 U.S.C. § 2 ..... 7
9 U.S.C. § 3 ..... 7
9 U.S.C. § 4 ..... 7

28 U.S.C. § 1254(1) ..... 2

*(Continued on following page)*

## Table of Authorities (Continued)


Page

**Federal Regulations**

Securities and Exchange Commission Regulations, (Rule 10b-5), (17 C.F.R. § 240.10b-5) ..... v. 4, 6, 7, 9

**Federal Rules**

Sup. Ct. R. 22.1 ..... 2

**Legislative History**

H. R. Rep. No. 94-229, 94th Cong. 1st Sess. (1975), *reprinted in*, 1975 U.S. Code Cong. & Ad. News, 179, 321, 342 ..... 11

**Appendices**

A. Opinion of the United States Court of Appeals for the Fifth Circuit ..... A-1

B. Orders entered by the United States District Court for the Western District of Texas, San Antonio Division denying Defendants' motions to dismiss and compel arbitration ..... B-1

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*Respondents*

## RESPONDENTS' BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents, Mayaja, Inc., Orart, S.A. Texas, Inc., Elias Sheinberg, and Marcia Sheinberg, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on October 24, 1986.

### Opinion Below

The opinion of the Court of Appeals for the Fifth Circuit is reported at 803 F.2d 157 and is reproduced herein at Appendix A.

The Orders of the United States District Court for the Western District of Texas (Garcia, D.J.) denying Petitioners' motions to stay and compel arbitration are reproduced herein at Appendix B. Those orders were not reported.

## Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This is a response brief filed pursuant to Sup. Ct. R. 22.1. The Petitioners' petition for certiorari was filed in this Court on January 14, 1987, and was received by Respondents' counsel on January 16, 1987. This response brief is being filed not more than 30 days thereafter.

## Statutes Involved

### The Securities Exchange Act of 1934

**15 U.S.C. § 78j(b):**

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —
>
> (b) to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

**15 U.S.C. § 78aa:**

> The district courts of the United States, the district court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive

jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 225 and 347). No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

**15 U.S.C. §§ 78cc(a) and (b):**

(a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

(b) Every contract made in violation of any provision of this title or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall

have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule or regulation; *Provided*, (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (2) or (3) of subsection (c) of section 15 of this title, and (B) that no contract shall be deemed to be void by reason in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) of section (c) of section 15 of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within 3 years after such violation.

## Statement of the Case

Respondents filed their original complaint in the United States District Court for the Western District of Texas, San Antonio Division on July 11, 1985 complaining that they had suffered money damages as a consequence of Petitioners' acts in violation of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk, and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. On August 30, 1985, Petitioners filed their first responsive pleadings in the form of a motion to dismiss and compel arbitration. That motion was denied by the District Court on September 20, 1985. A subsequent amended motion was denied on October 7, 1985. Thereafter, Petitioners commenced their appeal to the Court of Appeals for the Fifth Circuit. On October 24, 1986, the Fifth Circuit Court of Appeals rendered its opinion and held that claims brought under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 of the Securities and Exchange Commission, 15 C.F.R. § 240.10b-5, were not arbitrable while claims brought under § 1964(c) of RICO, 18 U.S.C.

§ 1964(c), were arbitrable. Petitioners' application for a writ of certiorari is based upon that portion of the opinion rendered by the United States Court of Appeals for the Fifth Circuit which denies the arbitration of the Section 10(b) claims.

Respondents' allegations contained in their original complaint may be summarized as follows:

Respondent Mayaja, Inc. ("Mayaja") is a Cayman Islands corporation. Respondent Orart, S.A. Texas, Inc. ("Orart") is a Texas corporation. The officers, directors and shareholders of both corporations are members of the family of Salomon Smilovici, a resident of Mexico City, Mexico. Respondents Elias and Marcia Sheinberg are husband and wife and reside in Mexico City, Mexico. Marcia Sheinberg is Salomon Smilovici's stepdaughter.

Petitioner Shearson Lehman Brothers, Inc. ("Shearson") is a Delaware corporation engaged in the securities brokerage business with an office in San Antonio, Texas. Petitioner Joseph F. Bodkin ("Bodkin") managed that office and Petitioner Nicholas S. Bustamante ("Bustamante") was a broker employed in that office during all periods material to this suit.

Mayaja, Orart, and the Sheinbergs maintained accounts with Shearson. At Bustamante's urgings, Mayaja and Orart entered into commodity trading agreements with Shearson. Thereafter, Bustamante purchased and sold silver contracts for the accounts of Mayaja and Orart. These transactions resulted in large unrealized losses which were incurred despite specific instructions that the losses to Mayaja were never to exceed $20,000 and the losses to Orart were never to exceed $10,000.

When Mayaja and Orart discovered the magnitude of the unrealized losses, they instructed Bustamante to immediately dispose of all silver contracts. Bustamante refused to do so and subsequently took delivery of the silver. Mayaja and Orart then instructed Bustamante to sell the silver in their accounts. Again, Bustamante refused to comply with their instructions. The unrealized losses increased as the price of silver fell. The unrealized losses were accompanied by margin calls. Bustamante

satisfied these calls against Mayaja by selling certificates of deposit owned by Mayaja and applying the proceeds to the amounts called. These sales were without authority. When Mayaja demanded an accounting of its certificates of deposit, Bustamante denied that they had been sold and provided Mayaja with false brokerage tickets indicating that the corporation still owned the certificates.

After margin calls exhausted all funds belonging to Mayaja and Orart, Bustamante forged the signatures of the Sheinbergs to a transfer authorization and illegally withdrew $39,700 from their account. Bustamante used these funds to meet Mayaja and Orart margin calls.

Although Bodkin was aware of these facts and was directly responsible for supervising and controlling Bustamante, he failed and refused to take any action to correct these transactions or discipline Bustamante. Instead, he attempted to cover up Bustamante's fraudulent actions and aided and abetted in the commission of his fraudulent actions.

Respondents have sought relief under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968.

The Petitioners generally deny all allegations of wrongdoing.

## Summary of the Argument

The arbitration agreements considered by the Court of Appeals are not enforceable because the claims which Respondents have asserted against Petitioners are not subject to arbitration.

## Reason for Granting the Writ

**In *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. _____, 84 L.Ed.2d 158, 162 (1985), this Court noted that the arbitrability of claims arising under § 10(b) of the Securities Exchange Act of 1934, or under Rule 10b-5, had not been resolved. This is an**

**important issue of federal law with respect to which there is a conflict among the Circuits. Although Respondents believe the issue was correctly decided by the Fifth Circuit, Respondents support the granting of a writ of certiorari.**

Petitioners' application for a writ of certiorari presents the issue of whether claims asserted under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 of the Securities and Exchange Commission, 15 C.F.R. § 240.10b-5, are arbitrable. The Arbitration Act, 9 U.S.C. §§ 1-14, permits parties to contract for the arbitration of their disputes:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

Section 3 of the act permits federal courts to stay proceedings that are referrable to arbitration. Section 4 empowers federal courts with authority to order a party to arbitrate a dispute arising out of a written agreement for arbitration. The Fifth Circuit Court of Appeals has held that Respondents' claims under § 10(b) and Rule 10b-5 were not subject to arbitration. A conflict exists between the Circuits as to the arbitrability of 10(b) claims. In addition to the Fifth Circuit, the Second, Third, Seventh, Ninth, Tenth and Eleventh Circuits hold that § 10(b) claims are not

arbitrable.[1] In contrast, the First and Eighth Circuits hold that § 10(b) claims may be arbitrated.[2]

The Supreme Court has ruled that private claims brought under § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(2), are not arbitrable. *Wilko v. Swan*, 346 U.S. 427 (1953). It held that § 14 of the Securities Act of 1933, 15 U.S.C. § 77n, prohibited the waiver of the right to select a judicial forum for the resolution of disputes arising under the Securities Act. This Court has not ruled on the arbitrability of claims arising under the Securities Exchange Act of 1934. Petitioners argue that these claims are arbitrable and have cited as authority Justice White's concurring opinion in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 84 L.Ed.2d 158, 167-68 (1985). Respondents contend that such claims are not arbitrable because the Exchange Act has its own anti-waiver clause applicable to all causes of action arising under the statute, the effect of which Congress has acknowledged.

The anti-waiver clause appearing in § 14 of the Securities Act of 1933 is duplicated with minor change in § 29(2) of the Securities Exchange Act of 1934. Both provisions express the will of Congress that there be no waiver of compliance with the rules and regulations of the statutes. 15 U.S.C. § 77n and 15 U.S.C. § 78cc. Both statutes reserve jurisdiction over disputes arising

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[1]*See McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94, 96-98 (2d Cir. 1986), *cert. granted*, 55 U.S.L.W. 3197 (U.S. Oct. 6, 1986) (No. 86-44); *AFP Imaging Corporation v. Ross*, 780 F.2d 202, 205 (2d Cir. 1985); *Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 538 F.2d 532, 536-37 (3d Cir. 1976), *cert. denied*, 429 U.S. 1010 (1976); *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197 (3d Cir. 1986); *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 558 F.2d 831, 833-36 (7th Cir. 1977); *De Lancie v. Birr, Wilson & Co.*, 648 F.2d 1255, 1257-59 (9th Cir. 1981); *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520 (9th Cir. 1986); *Bodart v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 775 (9th Cir. 1986); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore*, 590 F.2d 823, 827-29 (10th Cir. 1978); and *Wolfe v. E. F. Hutton & Co., Inc.*, 800 F.2d 1032 (11th Cir. 1986) (*en banc*).

[2]*See Page v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 806 F.2d 291 (1st Cir. 1986); and *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393 (8th Cir. 1986).

under the statutes to courts of law. 15 U.S.C. § 77v and 15 U.S.C. § 78aa. There are, therefore, no differences in the anti-waiver or jurisdiction clauses of the statutes that would warrant this Court in holding that the private remedies of the Securities Exchange Act are arbitrable while those of the Securities Act are not. But would a different holding be justified in the case of § 10(b) and Rule 10b-5 claims where the private remedy is implied rather than express? Respondents contend that a comparison of the statutes and this Court's rulings suggests otherwise.

The Securities Act of 1933 and the Securities Exchange Act of 1934 are two sides of the same coin. The Securities Act focuses on the registration and the sale of securities. The Exchange Act regulates securities transactions occurring after the securities have entered into the stream of commerce. 15 U.S.C. § 78b. Both statutes grant express private remedies.[3] In addition, this Court has held that remedies may be implied under the anti-fraud provisions of the statutes and their regulations.[4] These implied remedies are not court created laws. In order to imply a private remedy, courts must first find that Congress intended such a right. *Cort v. Ash*, 422 U.S. 62, 82 (1975). The implied private remedy is an expression of congressional intent. The right springs from the statute and is entitled to the same deference as any other congressional pronouncement. Thus, to degredate the rights found in implied statutory remedies while strictly enforcing those which are express would be to selectively enforce the will of Congress. Just as § 29(a) prohibits the waiver of the right of judicial enforcement of the express private remedies contained in Sections 9(e), 16(b) and 18(a) of the Exchange Act, it prohibits

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[3]*See* Sections 11 and 12 of the Securities Act of 1933, 15 U.S.C. §§ 77k and 771, and Sections 9(e), 16(b), and 18(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i, 78p, and 78r.

[4]*See Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 16 (1971) (acknowledging implied remedy under Section 10(b) and Rule 10b-5 of the Exchange Act); *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964) (holding that a private remedy could be asserted under Section 14(a) and Rule 14a-9 of the Exchange Act); and *Piper v. Chris Craft Industries, Inc.*, 430 U.S. 35 (1977) (permitting private action for violation of Section 14(e) of the Exchange Act).

the waiver of a judicial determination of disputes arising out of Section 10(b).

In *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 378-79 (1982), this Court noted that a private cause of action may be implied from the statute and its legislative history at the time of its enactment or from the recognition of implied rights at the time of its amendment.

> In determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue, the initial focus must be on the state of the law at the time the legislation was enacted. More precisely, we must examine Congress' perception of the law that it was shaping or reshaping. When Congress enacts new legislation, the question is whether Congress intended to create a private remedy as a supplement to the express enforcement provisions of the statute. When Congress acts in a statutory context in which an implied remedy has already been recognized by the courts, however, the inquiry logically is different. Congress need not have intended to create a new remedy, since one already existed; the question is whether Congress intended to preserve the pre-existing remedy.

Applying this rationale, this Court in *Curran* found that the failure of Congress to legislate-out the private cause of action under the Commodities Exchange Act which was routinely recognized when the statute was amended in 1974, was indicative of Congress' intent to afford a private cause of action.

The rationale of *Curran* is particularly useful in analyzing the private cause of action under § 10(b) and the application of the § 29(a) anti-waiver provision. The Securities Acts Amendments of 1975, Pub. L. 94-29, 89 Stat. 97, were the "most substantial and significant revision of the country's federal securities law since the passage of the Securities Exchange Act of 1934." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-85 (1983). By 1975 this Court had recognized the private cause of action under § 10(b), *Superintendent of Insurance v. Bankers*

*Life & Casualty Co.*, 404 U.S. 6, 16 (1971), and the federal courts had cited *Wilko v. Swan*, *supra*, for the proposition that private causes of action brought under the Securities Exchange Act were not arbitrable.[5] But in 1975, Congress made no effort to amend § 10(b) to eliminate the private cause of action, and, in discussing its amendment of § 28 of the Securities Exchange Act, it expressly recognized that private causes of action under that statute were not arbitrable:

> It was the clear understanding of the conferees that this amendment did not change existing law, as articulated in *Wilko v. Swan*, 346 U.S. 427 (1953), concerning the effect of arbitration proceeding provisions and agreements entered into by persons dealing with members and participants of self-regulatory organizations.

H.R. Rep. No. 94-229, 94th Cong., 1st Sess. (1975), *reprinted in*, 1975 U.S. Code Cong. & Ad. News 179, 321, 342. *See*, *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520, 522-24 (9th Cir. 1986).

By refusing to legislate-out the private remedies implied under § 10(b) and by recognizing that those remedies were non-arbitrable, Congress has indicated in the clearest terms its intent to judicially enforce through private action the provisions of § 10(b).

**Conclusion**

For the same reasons that this Court found that Congress did not intend to permit the arbitration of claims arising under the Securities Act of 1933, claims arising under the Securities Exchange Act of 1934 are non-arbitrable. The intent of Congress to require the judicial determination of claims arising under the Securities Exchange Act is apparent both in the words of the statute and in the legislative history. Because there is a division

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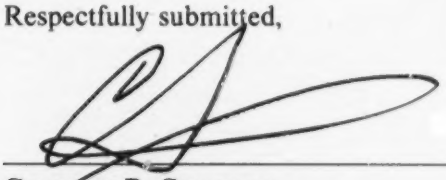
[5] *E.g. Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183 (2d Cir. 1966); and *Moran v. Paine, Webber, Jackson & Curtis*, 389 F.2d 242, 245-46 (3d Cir. 1968).

among the Circuits as to the arbitrability of 10(b) claims, and because this is a matter of national importance, this Court should grant a petition for certiorari.

Respectfully submitted,



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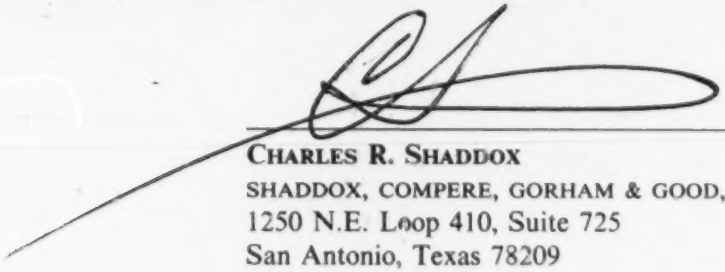
## Certificate of Service

I, Charles R. Shaddox, Counsel of Record for Respondents, hereby certify that on today's date, Monday, February 16, 1987, six copies of the Respondents' Brief on Petition for a Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit with regard to the above-styled case have been deposited in the United States Mail, with sufficient first class postage affixed thereto, with three copies sent addressed to Mr. Theodore A. Krebsbach and Mr. Jeffrey L. Friedman, Office of the General Counsel, Shearson Lehman Brothers, Inc., Two World Trade Center, New York, New York 10048; and three copies sent addressed to Mr. William D. Sims, Jr. and Mr. Will S. Montgomery, Jenkens & Gilchrist, 3200 Allied Bank Tower, Dallas, Texas 75202-2711, counsel for Petitioners. I further hereby certify that all parties required to be served have been served.



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# APPENDIX A

APPENDIX A

# UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MAYAJA, INC., S.A. ORART, ELIAS SHEINBERG, and MARCIA SHEINBERG,
*Plaintiffs-Appellees,*

v.

JOSEPH F. BODKIN, NICHOLAS S. BUSTAMANTE, and SHEARSON LEHMAN BROTHERS, INC.,
*Defendants-Appellants.*

No. 85-2762

OPINION

Filed October 24, 1986

Before: Thomas Gibbs Gee, Carolyn Dineen Randall and W. Eugene Davis, Circuit Judges.

Opinion by Judge Carolyn Dineen Randall

Appeal from the United States District Court
for the Western District of Texas
H. F. Garcia, District Judge, Presiding

## SUMMARY


**Abritration/RICO/Securities**

Appeal from a decision denying a motion to compel arbitration of securities fraud claims and RICO claims. Affirmed in part, reversed in part and remanded.

Plaintiffs brought suit against defendants Shearson Lehman Brothers, Inc. (Shearson), a Shearson manager, and the manager's supervisor based upon a series of transactions involving plaintiffs' financial management and commodity accounts with Shearson. Plaintiffs assert claims of securities fraud under section 10(b) of the Securities Exchange Act of 1934 (the 1934 Act) and under Rule

10b-5 of the Securities and Exchange Commission. They also assert civil RICO claims based upon predicate acts of mail and wire fraud as well as upon the acts of securities fraud independently asserted. Defendants filed a motion to compel arbitration, which the district court denied.

[1] Agreements to transact in commodities futures and securities involve interstate commerce, which makes the Federal Arbitration Act applicable to the instant proceeding, and [2] the arbitration clauses involved here encompass the claims asserted. Both the 1934 Act claims and the RICO claims arise out of or relate to the plaintiffs' accounts or transactions with Shearson. [3] In order for a statutory claim to overcome the overriding federal policy in favor of arbitration, the party opposing the motion to compel must produce evidence that Congress intended the statutory claim to be non-arbitrable. [4] Based on the anti-waiver provision of the 1934 Act, Fifth Circuit cases have consistently held that Congress intended 1934 Act claims to be non-arbitrable. [5] Although defendants argue that recent Supreme Court decisions have implicitly overruled this established precedent, absent a clear statement from the Supreme Court, the confirmed precedent will not be upset. [6] As to the RICO claims, RICO contains no anti-waiver provisions similar to those of the 1933 and 1934 securities acts. [7] The primary purpose of section 1964(c), RICO's private treble-damages provision, is to compensate those inujured by organized crime; the section's secondary purpose is to deter racketeers from inflicing such injuries. Since plaintiffs may effectively vindicate their section 1964(c) cause of action in the arbitral forum, the congressional purpose behind section 1964(c) will be served by arbitration. [8] This case presents another instance when, instead of being used against mobsters and organized criminals, section 1964(c) has become a tool for everyday fraud cases against respected and legitimate enterprises. The claims presented as a whole are the kind of claims for which the Commodity Futures Trading Commission has enacted extensive regulations governing arbitration. In this type of case, the congressional purpose of compensation and deterrence underlying section 1964(c)—to the extent that any considerations of deterrence are present—may be fulfilled by arbitration. Thus, the RICO claims must be submitted to arbitration under the Federal Arbitration Act.

## OPINION

CAROLYN DINEEN RANDALL, Circuit Judge:

I.

In July of 1985, plaintiffs Mayaja, Inc. (Mayaja), Orart S.A. Texas, Inc. (Orart), and Elias and Marcia Sheinberg brought suit against defendants based upon a series of transactions involving their financial management and commodity accounts with defendant Shearson Lehman Brothers, Inc. (Shearson). Both Mayaja and Orart are closely-held private corporations whose officers and directors are members of the Sheinbergs' family. Mayaja and Orart allege that defendant Bustamante, the manager of their discretionary commodity accounts with Shearson, conducted a number of unauthorized transactions on the accounts with the complicity of his supervisor, defendant Bodkin, resulting in staggering losses. The Sheinbergs allege that Bustamante forged their signatures and withdrew money from their financial management account in order to meet margin calls on the commodity accounts of Mayaja and Orart. The plaintiffs assert against defendants claims of securities fraud under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 of the Securities and Exchange Commission. Plaintiffs also assert civil RICO claims based upon predicate acts of mail and wire fraud, in violation of 18 U.S.C. §§ 1341 and 1343, as well as upon the acts of securities fraud independently asserted.[1]

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[1] *See* Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1964(c), 1962 & 1961(1). Section 1964(c) provides treble damages for persons injured by RICO violations:

> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c). Section 1962, in turn, describes the activities that RICO prohibits:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has par-

Defendants responded to the complaint with a motion to compel arbitration. Plaintiffs had agreed to arbitrate "any controversy arising out of or relating to [their] accounts, to transactions with [Shearson] . . . or to [their] agreement[s] or the breach thereof" when they signed their respective agreements.[2] The defendants

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ticipated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

. . . .

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. § 1962. Finally, section 1961 defines the key phrases "racketeering activity" and "pattern of racketeering activity":

As used in this chapter —

(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), . . . or (D) any offense involving . . . fraud in the sale of securities . . . .

. . . .

. . . .

. . . .

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . . .

18 U.S.C. § 1961(1), (5).

[2] Paragraph 13 of the Customer's Agreement signed by Elias and Marcia Sheinberg reads in pertinent part:

Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, to transactions with [Shearson]

argued that the Supreme Court's decisions in *Dean Witter Reynolds Inc. v. Byrd*, 105 S. Ct. 1238 (1985), and in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985), implicitly overruled established precedent in this circuit holding that securities fraud claims under the 1934 Act are not arbitrable. *E.g., Sibley v. Tandy Corp.*, 543 F.2d 540 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977). Defendants also asserted that these same Supreme Court decisions argue for the arbitrability of the RICO claims.

The district court found that the Court's opinions specifically declined to address the question of the arbitrability of 1934 Act claims. Holding that Justice White's suggestion that 1934 Act claims may be arbitrable, contained in his concurring opinion in *Byrd*, was insufficient to overcome established precedent in this circuit, the court below denied the motion to compel arbitration.

On appeal of the order denying the motion to compel arbitration,[3] we affirm in part and reverse in part.

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> for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as I may elect.

Supplemental Record on Appeal at 7.

The Commodity Account Agreements signed by Mayaja and Orart contained, as an addendum, a separately signed Arbitration Agreement that reads in part as follows:

> Any controversy arising out of or relating to the Corporation's account, to transactions with [Shearson] for the Corporation or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules, then in effect, of the Board of Directors of the New York Stock Exchange, Inc. or of the American Arbitration Association Inc., as the Corporation may elect. . . .
>
> While the Commodity Futures Trading Commission (CFTC) encourages the settlement of disputes by arbitration, it requires that your consent to such an agreement be voluntary. You need not sign this Arbitration Agreement to open an account with Shearson. (See 17 CFR 180.1-180.6)

*Id.* at 14, 19.

[3] We note jurisdiction over this interlocutory appeal under 28 U.S.C. § 1292(a)(1). An appeal of an order denying a motion to compel arbitration

II.

This appeal presents the question of whether, under the Federal Arbitration Act, 9 U.S.C. §§ 1-14, plaintiffs' securities fraud and RICO claims must be submitted to arbitration. Like any decision whether to order arbitration under the Act, the inquiry in this case divides into two broad parts: first, did the parties agree to arbitrate the disputes in question, and, second, did Congress intend that the claims *sub judice* be arbitrable? *See Mitsubishi*, 105 S. Ct. at 3354, 3355. Accordingly, we first examine whether plaintiffs' arbitration agreements encompass the statutory claims asserted; in Part III we consider the arbitrability of these claims.

**[1]** As a preliminary matter, we note that the contracts before us involve "commerce" within sections 1 and 2 of the Act sufficient to bring sections 3 and 4 of the Act into play. Agreements to transact in commodities futures without question involve interstate "commerce" as that term is defined in section 1,[4] and an agreement

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falls within the purview of the decrepit *Enelow-Ettelson* rule, recently reiterated by this court as follows:

> "An order staying or refusing to stay proceedings in the District Court is appealable under § 1292(a)(1) only if (A) the action in which the order was made is an action which, before the fusion of law and equity, was by its nature an action at law; *and* (B) the stay was sought to permit the prior determination of some *equitable* defense or counterclaim."

*Tenneco Resins, Inc. v. Davy Int'l, AG*, 770 F.2d 416, 418 (5th Cir. 1985) (quoting *Jackson Brewing Co. v. Clarke*, 303 F.2d 844, 845 (5th Cir.), *cert. denied*, 371 U.S. 891 (1962)) (emphasis in original); *see Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942). It is clear that the securities fraud and RICO claims are legal causes of action. *See Cobb v. Lewis*, 488 F.2d 41, 46 (5th Cir. 1974) (claims for damages under securities fraud and antitrust laws are legal claims); *see also Byrd*, 105 S. Ct. 1238 (taking jurisdiction, without discussion, of appeal of order denying motion to compel arbitration in context of securities fraud claims). Since a stay pending arbitration is an equitable defense, *Tenneco Resins*, 770 F.2d at 419, the order appealed *sub judice* falls within the *Enelow-Ettelson* rule and is appealable.

[4] "[C]ommerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation . . . .

to transact in securities is no less interstate in nature. Having determined the applicability of the Arbitration Act to the instant proceeding, we now pause to consider whether "the issue involved in [this] suit or proceeding is referable to arbitration under such an agreement." 9 U.S.C. § 3.

[2] We find that the arbitration clauses before us encompass the claims asserted in this dispute. Both the 1934 Act claims and the RICO claims "aris[e] out of or relat[e] to" the plaintiffs' accounts or transactions with Shearson: the securities fraud allegations and the other acts predicate to the RICO claim all derive from Shearson's handling of the plaintiffs' accounts or from transactions on those accounts made by Shearson's agents. Bearing in mind the federal policy that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983), we find it clear that the parties agreed to arbitrate these claims. *Cf. Mitsubishi*, 105 S. Ct. at 3353 n.13 (construing more restrictive arbitration clause as encompassing arbitration of antitrust claims). We now turn to consider whether plaintiffs' 1934 Act and RICO claims are non-arbitrable even though they have agreed to arbitrate them.

III.

[3] In order for a statutory claim to overcome the overriding federal policy in favor of arbitration, *Moses H. Cone*, 460 U.S. at 24-25, it is necessary that the party opposing the motion to compel produce evidence that Congress intended the statutory claim to be non-arbitrable. *See Mitsubishi*, 105 S. Ct. at 3355. A mere absence of evidence that Congress intended the claims to be arbitrable is insufficient to overcome the presumption in favor of arbitrability; the party opposing the motion must show that Congress intended to make an exception to the Arbitration Act of the statutory claim in question. As the Supreme Court instructed in its *Mitsubishi* opinion:

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Federal Arbitration Act, 9 U.S.C. § 1. Section 2 of the Act provides that a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

> Just as it is the congressional policy manifested in the federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable . . . . We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.

*Id.*

Thus, the task of a court in determining the arbitrability of a claim under the Federal Arbitration Act is, first, to examine the relevant statutory text and legislative history for express evidence that Congress intended the statutory claim concerned to be non-arbitrable. In many cases Congress may not have explicitly addressed the arbitrability question. In this event, the court must carefully examine the *congressional* policies prompting the enactment of the cause of action to determine whether, in light of these policies, an implicit congressional intention that the claims under the statute not be subjected to arbitration may be inferred due to the inability of these policies to be furthered if the claims are subject to arbitration. *See Mitsubishi*, 105 S. Ct. at 3357-59 (examining, in the absence of an explicit statement of congressional intent as to arbitrability, congressional policies behind § 4 of the Clayton Act); *cf. McDonald v. City of West Branch*, 104 S. Ct. 1799, 1803-04 (1984) (basing finding of congressional intent that § 1983 claims be non-arbitrable upon conflict between arbitration and § 1983's objectives); *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740-45 (1981) (finding congressional intent that FLSA claims be non-arbitrable because of conflict between arbitration and FLSA's purposes); *Alexander v. Garner-Denver Co.*, 415 U.S. 36, 56 (1974) ("The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal.").

With these rules of statutory interpretation in mind, we turn to the questions of whether Congress intended that 1934 Act and pri-

vate RICO claims be litigated in factual settings similar to that of the case before us.

A.

**[4]** This court has on many occasions addressed the question of the arbitrability of 1934 Act claims, and consistently held that Congress intended these claims to be non-arbitrable. *See, e.g., Bustamante v. Rotan Mosle, Inc.*, No. 86-2300, slip op. 339, 340 (5th Cir. Oct. 17, 1986); *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 785 F.2d 1274, 1275 n.1 (5th Cir. 1986); *Sawyer v. Raymond, James & Assocs., Inc.*, 642 F.2d 791, 792 (5th Cir. Unit B 1981); *Sibley v. Tandy Corp.*, 543 F.2d 540, 543 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977). Basing their decisions upon an extension of the Supreme Court's analysis of the anti-waiver provision of the Securities Act of 1933 in *Wilko v. Swan*, 346 U.S. 427 (1953), these opinions found the similar anti-waiver provision of the 1934 Act to expressly preclude arbitration of the private cause of action that Congress implied in section 10(b) of the 1934 Act. *See, e.g., Sibley*, 543 F.2d at 543 n.3.

**[5]** Defendants argue that the Supreme Court's decisions in *Mitsubishi* and in *Dean Witter Reynolds Inc. v. Byrd*, 105 S. Ct. 1238 (1985), implicitly overrule our established precedent. As this court recently held in *Bustamante v. Rotan Mosle, Inc.*, neither of these Supreme Court opinions addressed the question of the arbitrability of 1934 Act claims. No. 86-2300, slip op. at 340-41 (5th Cir. Oct. 17, 1986). We agree with *Bustamante* and four other circuits that, absent a clearer statement from the Court as to the arbitrability of 1934 Act claims, we must abide by the confirmed precedent of our circuit. *Id.*; *accord Wolfe v. E.F. Hutton & Co., Inc.*, Nos. 85-3352, 85-5419 (11th Cir. Sept. 29, 1986) (en banc); *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197 (3rd Cir. 1986); *Conover v. Dean Witter Reynolds, Inc.*, 794 F.2d 520 (9th Cir. 1986) (finding, as a matter of first impression, 1934 Act claims to be non-arbitrable); *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir.), *cert. granted*, 55 U.S.L.W. 3197 (U.S. Oct. 6, 1986) (No. 86-44). *Contra Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393 (8th Cir. 1986). We therefore hold that the district court did not err in refusing to compel arbitration of the 1934 Act claims.

B.

The question of whether private RICO claims may be arbitrated is of first impression in this court.[5] Both the Second and Third Circuits have ruled on this question: the Second Circuit holding that private RICO claims may never be arbitrated, and the Third Circuit holding that such claims may be arbitrated when the offenses predicate to the required "pattern of racketeering activity" are arbitrable. *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir.), *cert. granted*, 55 U.S.L.W. 3197 (U.S. Oct. 6, 1986) (86-44); *Jacobson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 797 F.2d 1197 (3rd Cir. 1986). We hold that, at least in the context of claims like that *sub judice*, private RICO claims must be arbitrated under the Federal Arbitration Act.[6]

(*Text continued on page 682*)

[5] A panel of this court briefly addressed, in dicta, the question of the arbitrability of private RICO claims. *Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 785 F.2d 1274, 1280-82 (5th Cir. 1986). On petition for rehearing and suggestion for rehearing en banc, the panel noted that its reasoning on the RICO issue was seriously called into question by *Mitsubishi*. *Id.* at 1282. The panel therefore amended its opinion "to refuse to decide the arbitrability *vel non* of the plaintiffs' RICO claim." *Id.*

[6] We recognize that our decision accords neither with *McMahon* nor with *Jacobson*, further adding to the split already present among the circuits. *McMahon*, 788 F.2d 94 (2d Cir.), *cert. granted*, 55 U.S.L.W. 3197 (U.S. Oct. 6, 1986) (No. 86-44); *Jacobson*, 797 F.2d 1197 (3rd Cir. 1986) (2-1 decision). We respectfully cannot agree with the reasoning of either of these two opinions.

*McMahon* based its holding that RICO claims can never be arbitrated on "strong policy concerns, the need for development of the record, and judicial clarification and resulting consistency in resolving disputes under this relatively new statute." 788 F.2d at 99. The policy concerns mentioned by the court were developed by analogy to *American Safety Equip. v. J.P. Maguire & Co., Inc.*, 391 F.2d 821 (2d Cir. 1968), a Second Circuit opinion banning arbitration of antitrust claims. *American Safety* argued that a "plaintiff asserting his rights under the [Sherman] Act has been likened to a private attorney-general who protects the public's interest." 391 F.2d at 826. *McMahon* held that comparable concerns inherent in the enforcement of RICO claims precluded their arbitration. 788 F.2d at 98.

We decline to follow *McMahon* because, as the Third Circuit noted, "the *McMahon* court paid too little deference to the Supreme Court's decision in *Mitsubishi*." *Jacobson*, 797 F.2d at 1202. *McMahon* ignores *Mitsubishi*'s instruction that congressional intent governs the analysis of arbitrability of a statutory claim under the Arbitration Act. After *Mitsubishi*, "determining stat-

utory claims to be nonarbitrable on the basis of some judicially recognized public policy rather than as a matter of statutory interpretation is no longer permissible." *Id.* Since *McMahon* does not base its decision on a statutory interpretation of section 1964(c), we cannot follow its analysis. Moreover, we find *McMahon*'s reliance on *American Safety* misplaced. Although the Supreme Court did not explicitly overrule *American Safety* in the domestic context, *Mitsubishi* rejected so much of *American Safety*'s reasoning it is difficult to say what is left of the opinion to rely on. *See Mitsubishi*, 105 S. Ct. at 3357-60. Certainly the Court rejected that portion of *American Safety*'s reasoning relied upon by *McMahon*. *See id.* at 3359 ("Notwithstanding its important incidental policing function. . . . § 4 of the Clayton Act . . . seeks primarily to enable an injured competitor to gain compensation for that injury.").

On the other hand, we must also respectfully decline to follow the reasoning of the Third Circuit. *Jacobson* defined the relevant field of statutory interpretation as consisting of (or at least including) the predicate statutes necessary for a section 1964(c) action: "Because of the unique structure of the RICO statute, which cross-references other predicate statutes, we must, in making the statutory interpretation required by *Wilko* and *Mitsubishi*, look to those statutes as well." *Jacobson*, 797 F.2d at 1202. In fact, *Jacobson* did not examine section 1964(c)'s text or legislative history, instead relying exclusively upon the text of predicate statutes. *See id.* at 1203. Following precedent holding 1934 Act claims to be non-arbitrable, *Jacobson* ruled that RICO claims based on predicate violations of the 1934 Act were not subject to arbitration. *Id.* Finding no indication of a congressional intent to make violations of the federal mail fraud statute, 18 U.S.C. § 1341, and wire fraud statute, 18 U.S.C. § 1342, non-arbitrable, however, *Jacobson* held that RICO claims founded upon these predicate statutes were arbitrable. 797 F.2d at 1203.

We find, however, that a claim under section 1964(c) is logically discrete from claims under its predicate statutes. As Judge Adams observes in his dissent from the majority opinion in *Jacobson*:

> A private right of action under RICO is a unique and separate claim to which the Arbitration Act logically applies. RICO is a manifestation of congressional concern with the special harm caused by those who engage in a pattern of wrongful offenses, and the private right of action under the RICO statute is distinct from one based on an underlying offense alone.

*Jacobson*, 797 F.2d at 1209 (Adams, J., dissenting). Judge Adams also notes that the difference between the RICO action and its predicate violations is demonstrated by the structure of the RICO statute. Unlike any individual predicate offense, RICO proscribes the operation of any "enterprise" engaged in or whose activities affect interstate or foreign commerce, using income derived from a "pattern of racketeering activity." *Id.* (citing 18 U.S.C. § 1962). "Pattern of racketeering activity" is defined as at least two violations of any predicate

**[6]** As the Third Circuit pointed out, RICO contains no anti-waiver provision similar to those of the 1933 and 1934 securities acts. *Jacobson*, 797 F.2d at 1202. In the instant case, the congressional intent as to the arbitrability of private RICO claims cannot be ascertained from the text of the statute. We turn, then, to the legislative history for guidance.

Added to the House version of the bill after the original bill had been passed by the Senate, the private treble-damages provision later codified as section 1964(c) received relatively little discussion in either house of Congress. *See Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275, 3280 (1985). The congressional discussion of the treble-damages provision did not touch upon the arbitrability of

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statute within a ten-year period. 18 U.S.C. § 1961(5). Section 1964(c) further adds the requirement that the plaintiff asserting a private RICO action have been injured by the "enterprise" as a result of such "racketeering activity." Thus, by its very structure, the RICO claim is distinct from its predicate offenses.

Judge Adams criticizes the majority opinion in *Jacobson* for splitting a single RICO count when that count is predicated upon arbitrable and non-arbitrable offenses:

> [T]he result reached by the majority would divide that [single RICO] count in order to allow for arbitration of the mail and wire fraud issues and litigation in a court of the securities issues—despite the fact that the unique RICO offense depends, in this case, on whether the enterprise has engaged in mail and wire fraud *as well as* securities fraud within a ten-year period.

*Id.* at 1210 (emphasis in original). The fallacy in *Jacobson*'s reasoning is further pointed out by its handling of the mail and wire fraud issues. The majority opinion held that RICO claims predicated upon mail or wire fraud statutes are arbitrable because "[n]o provision of the mail or wire fraud statutes bears any similarity to the anti-waiver provision of the 1933 and 1934 securities acts." *Id.* at 1203. No such anti-waiver provision can be found in the mail and wire fraud statutes because these are *criminal felony* statutes; arbitration of a felony charge simply does not occur in our legal system. A court searching for congressional intent as to arbitrability in criminal statutes will always return with empty hands. Private parties such as the plaintiffs in this case do not have standing to bring suit under these statutes. Only through RICO's section 1964(c) do they have standing to invoke these mail and wire fraud statutes at all, and it is, logically, to RICO that courts must look to determine the arbitrability of their claims.

claims brought under the provision. *Accord Jacobson*, 797 F.2d at 1202. Since Congress has not expressly indicated its intent as to the arbitrability of these claims, we examine the congressional purposes underlying the enactment of section 1964(c) to determine whether, because of an inherent conflict between these purposes and the arbitration of the claims, Congress implicitly intended that all such claims be non-arbitrable.

Representative Steiger introduced the private treble-damages provision to the House Judiciary Committee as a primarily compensatory, and secondarily deterrent, measure:

> One possible amendment, for example, which I would raise for your consideration, would add a private civil damage remedy to title IX [the RICO subchapter of the Organized Crime Control Act], similar to the private damage remedy found in the anti-trust laws. Not every businessman, of course, will wish to take advantage of such a remedy, but those who have been wronged by organized crime should at least be given access to a legal remedy. In addition, the availability of such a remedy would enhance the effectiveness of title IX's prohibitions.

*Hearings on S.30, and Related Proposals, before Subcommittee No. 5 of the House Committee on the Judiciary*, 91st Cong., 2d Sess., 520 (1970) [hereinafter cited as *House Hearings*]. The American Bar Association independently proposed an amendment to RICO "authorizing private damage suits based upon the concept of Section 4 of the Clayton Act." *Id.* at 544; *see also id.* at 559, 560 (identical proposal by ABA Section of Criminal Law).

While the bill was debated before the full House, several representatives referred to the private treble-damages provision. Representative Poff mentioned the provision as "another example of the antitrust remedy being adapted for use against organized criminality." 116 Cong. Rec. at 35,295 (1970); *see also id.* at 35,346 (Representative Poff noting that the provision "has its counterpart almost in haec verba in the antitrust statutes"). Representative Steiger asserted that "[i]t is the intent of this body, I am certain, to see that innocent parties who are the victims of organized crime have a right to obtain proper redress.... It represents the one

opportunity for those of us who have been seriously affected by organized crime activity to recover." *Id.* at 35,346-47. Representative Mikva, referring to the treble-damages provision, proposed amending title IX of the bill to ensure that "we do not let some criminal law be abused by an overzealous competitor." *Id.* at 35,343. In proposing his amendment, which was rejected by the House, *id.*, Mr. Mikva noted the similarity of the treble-damages provision to the antitrust laws and implied that the purpose of the provision was compensatory. *Id.* at 35,342 (describing the private treble-damages provision as "sauce for the goose" injured by organized crime whereas his amendment provided "protection for the gander" that might be injured by frivolous suits brought by an aggressive competitor).

While the bill was pending in the House, Senator McClellan brought the attention of the Senate to the proposed treble-damages amendment. *Id.* at 25,190. Senator McClellan explained that the proposed amendment would "authorize private civil damage suits based upon the concept of section 4 of the Clayton Antitrust Act. This amendment, particularly, should prove, if accepted by the House, to be a major new tool in extirpating the baneful influence of organized crime in our economic life." *Id.* It is difficult to evaluate from his statement whether the senator regarded the treble-damages provision as a primarily compensatory or deterrent measure. While the word "extirpate," to root out, suggests a more deterrent connotation, the sentence's object, the "baneful influence of organized crime in our economic life," suggests that the wrong addressed by the provision is the economic damage caused by organized crime—a wrong more appropriately addressed by compensatory measures than by deterrent measures.

The House passed the bill with the treble-damages provision in the form proposed by the Committee. *Id.* at 35,363-64; *Sedima,* 105 S. Ct. at 3281. The Senate did not seek a conference, and adopted the bill as amended in the House. 116 Cong. Rec. at 36,296; *Sedima,* 105 S. Ct. at 3281.

The legislative history of section 1964(c) thus reveals three currents of congressional purpose. First, and perhaps foremost, is the congressional intention of compensating "the victims of organized crime." Second, the provision was intended to deter organized

crime by "enhanc[ing] the effectiveness of title IX's prohibitions." Finally, one notes that the most recurrent theme in the legislative history of the section is found in the repeated references to section 4 of the Clayton Act. Since these references to the Clayton Act could be argued to be an adoption by reference of the purposes of the Clayton Act's treble-damages provision, we survey the goals of the Clayton Act for further clarification of the congressional intent behind section 1964(c).

The Supreme Court in *Mitsubishi* thoroughly examined the legislative intent behind section 4 of the Clayton Act for the purpose of determining the arbitrability of section 4 claims. 105 S. Ct. at 3358-60. While acknowledging that "[t]he treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators," *id.* at 3358, the Court held that "[n]otwithstanding its important incidental policing function, the treble-damages cause of action . . . seeks primarily to enable an injured competitor to gain compensation for that injury." *Id.* at 3359. Emphasizing the priority of the role of treble damages as compensation over its role as enticement for private attorneys general, the Court noted that the antitrust cause of action remains at all times under the control of the individual litigant, and that the private antitrust plaintiff needs no executive or judicial approval before settling a treble-damages suit. *Id.* Because the deterrent function was secondary to the compensatory function, the Court concluded that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 3359-60.

[7] *Mitsubishi*'s reading of the legislative purpose of section 4 of the Clayton Act, recurrently invoked during the congressional discussion of RICO's private treble-damages provision, accords with our analysis of the legislative history of section 1964(c). The primary purpose of the section is to compensate those injured by organized crime; the section's secondary purpose is to deter racketeers from inflicting such injuries. Paralleling *Mitsubishi*'s analysis, we find no evidence that Congress implied that all RICO claims be non-arbitrable. Since plaintiffs may effectively vindicate their section 1964(c) cause of action in the arbitral forum, the congressional purpose behind section 1964(c) will continue to be served.

**[8]** The case *sub judice* presents yet another instance when, "[i]nstead of being used against mobsters and organized criminals, [section 1964(c)] has become a tool for everyday fraud cases brought against 'respected and legitimate 'enterprises.' '" *Sedima*, 105 S. Ct. at 3287 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 487 (2d Cir. 1984)). The claims presented as a whole are the kind of claims for which the Commodity Futures Trading Commission has enacted extensive regulations governing arbitration. *See* 17 C.F.R. §§ 180.1-.5 (1986). In cases like that before us, the congressional purposes of compensation and deterrence underlying section 1964(c)—to the extent that any considerations of deterrence are present—may be fulfilled by arbitration of the plaintiffs' claims. We hold, therefore, that the plaintiffs' RICO claims must be submitted to arbitration under the Federal Arbitration Act.

IV.

The order of the district court denying defendants' motion to compel arbitration is AFFIRMED with respect to plaintiffs' 1934 Act claims; with respect to plaintiffs' private RICO claims the district court's order is REVERSED and REMANDED with instruction to compel arbitration in accordance with the Federal Arbitration Act and relevant agency regulations.

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# APPENDIX B

## APPENDIX B

## IN THE UNITED STATES DISTRICT COURT

## FOR THE WESTERN DISTRICT OF TEXAS

## SAN ANTONIO DIVISION

FILED
SEP 23 1985
CHARLES W. WAGNER, Clerk
By
Deputy

**SA-85-CA-2051**

MAYAJA, INC., *et al,*

*Plaintiffs*

v.

JOSEPH F. BODKIN, *et al,*

*Defendants*

## ORDER

On this day came on to be considered defendant's motion to dismiss and compel arbitration. The Court finds plaintiffs' allegations to be sufficiently specific to comply with Rule 9(b) F.R.Civ.P. Arbitration of the federal securities claim will be denied based upon the established law in the Fifth Circuit. *See, Smokey Greenhaw Cotton Co., Inc.* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 720 F.2d 1446, 1448 (5th Cir. 1983). Defendants argue that claims brought pursuant to the 1934 Act, are subject to arbitration since the Supreme Court's decision in *Dean Witter Reynolds, Inc.* v. *Byrd,* ____ U.S. ____, 105 S.Ct. 1238 (1985). Among other authorities, a recent order from the Austin Division of this district is cited in support of defendants' position; this Court is of the contrary opinion. The Supreme Court in *Byrd*, 105 S.Ct. at 1240, n.1, specifically stated that the issue of the arbitrability of 1934 Act claims was not before it. The suggestion in the concurring opinion of Justice White that such claims are arbitrable is insufficient to overcome clearly established Fifth Circuit precedent.

It is therefore ORDERED that defendants' motion to dismiss and compel arbitration is DENIED.

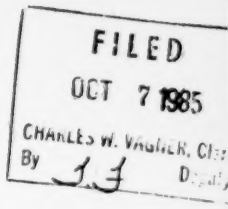
SIGNED this 20th day of September, 1985.

H. F. GARCIA
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION




SA-85-CA-2051

MAYAJA, INC., *et al,*

*Plaintiffs*

v.

JOSEPH F. BODKIN, *et al,*

*Defendants*

## ORDER

On this day came on to be considered defendants' motion to reconsider order denying defendants' motion to stay or dismiss and compel arbitration and amended motion to stay or dismiss and compel arbitration . The Court has considered same and is of the opinion that it should be in all things DENIED.

It is so ORDERED.

SIGNED this 7th day of October, 1985.

H. F. GARCIA
United States District Judge